



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 14, 1997

Ms. Barbara L. Quirk
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR97-2491

Dear Ms. Quirk:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 110298.

The City of San Antonio Parks and Recreation Department (the "city"), which your office represents, received a request for "the February 1997 merchandising evaluation report provided by the Retail Network, as requested by the asset management department of the City . . . coincident with the proposed Riverwalk retail merchandising program." You state that the company which submitted the information has stated that release of the information "would aid a competitor in offering merchandise at a price which undercuts their price."¹ You have submitted for our review the requested records at issue and ask whether the information is excepted from required public disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted records.

Pursuant to section 552.305 of the Government Code, we notified Yanaguana Cruises, Inc. ("Yanaguana") of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. Yanaguana did not respond to our notification. However, because you claim section 552.110 on the company's behalf, we will consider whether the information at issue is excepted from disclosure under section 552.110.

¹We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided. See Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). Therefore, the requested information is not excepted from disclosure under the trade secret prong of section 552.110.

We next consider whether the information at issue constitutes "commercial or financial information." Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985) (footnotes omitted). Neither the city nor Yanaguana have established that releasing the requested information would likely cause Yanaguana to suffer substantial competitive injury. Therefore, we conclude that the requested information is not excepted from disclosure pursuant to section 552.110.

We next consider whether section 552.104 applies to any of the submitted records. Section 552.104 states that:

[i]nformation is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

Section 552.104 protects the government's interest in purchasing by assuring that the bidding process will be truly competitive. See Open Records Decision Nos. 592 (1991) (exception protects interests of governmental body, usually in competitive bidding situations), 583 (1990), 554 (1990). Section 552.104 requires a showing of some specific actual or potential harm in a particular competitive situation. See Open Records Decision Nos. 593 (1991), 554

(1990), 541 (1990). Furthermore, a general allegation of a remote possibility that some unknown competitor might gain some unspecified advantage by disclosure is not sufficient to invoke section 552.104. *Id.*; *see also* Open Records Decision No. 331 (1982) (where only one person seeks contract, no "competitors" exist for purposes of predecessor to section 552.104).

In this instance the requested record, as stated in Yanaguana's letter, was issued "by the City's retail consultant." *See* Open Records Decision No. 231 (1979) (feasibility study prepared by governmental body not excepted by the predecessor to section 552.104). Further, it appears that the city is claiming section 552.104 on behalf of a third-party, whose interests this section is not designed to protect. *See generally* Open Records Decision Nos. 592 (1991). Under the facts presented, we conclude that the requested record may not be withheld pursuant to section 552.104 of the Government Code.

Finally, we consider whether section 552.101 excepts any of the submitted information. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. We have examined the submitted information and conclude that the submitted information cannot be withheld pursuant to section 552.101. Additionally, we are not aware of any law that makes the requested information confidential, nor do you raise any such statute. Accordingly, we conclude the city may not withhold the submitted information based on section 552.101 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sam Haddad", with a large, stylized initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref: ID# 110298

Enclosures: Submitted documents

cc: Mr. Harry G. Leeper, Jr.
P.O. Box 2508
San Antonio, Texas 78299-2508
(w/o enclosures)

Mr. Doug Almond
Yanaguana Cruises, Inc.
315 East Commerce Street, Suite 202
San Antonio, Texas 78205
(w/o enclosures)